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No. 82-756

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ESTATE OF CLINTON T. FROCK, deceased; and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. Respondent makes two contentions which are misleading or inaccurate.

First, it borders on the disingenuous to assert that section 3(h)(6) "produced unfortunate results for those persons who did not become eligible for dual benefits

until shortly before the cut-off and thus were unable to prosecute their claims to a successful conclusion in time." (Resp. 6) As respondent well knows, the majority of those affected were eligible long before the cut-off date; they were harmed not by the timing of §3(h)(6), but by the Board's ongoing refusal to determine their existing eligibility. Most of the estimated 20,000 to 50,000 so affected were, by definition, previously eligible for dual benefits pursuant to §§3(h)(3) or (4) of the Act. Most had already retired by the date on which this Court decided the Goldfarb cases (March, 1977), and thus were eligible from the start for dual benefits. The effect of the cut-off date was not to frustrate a few unfortunates who were unable to "prosecute their claims to a successful conclusion," but to protect the Board from the inevitable decision which would force it to apply the correct (Gebbie) interpretation of §§3(h)(3) and (4) to everyone in that circumstance.

That difference defines the significance of this case, and distinguishes it from those cases where an arbitrary date

is used to restrict eligibility. The issue here is not the use of a deadline, but, rather, the refusal of the Board to act in accordance with its statutory obligations to process claims and determine eligibility. It is not the bad luck of a few who ran out of time which describes the due process violation, but the Board's refusal to respond to the claims of thousands.[1/]

1/ Respondent is wrong, therefore, to deny the applicability of Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), to this situation (Resp. 5-6). The Board describes Logan as involving the extinction of a "cause of action ... for no valid reason but simply because the state authorities had erred." (Resp. 5) Here, the right to benefits was also extinguished for no valid reason -- and in a considerably more distasteful manner: the responsible agency intentionally declined to comply with the law, and then, retroactively, that behavior was validated. In both instances, the claimants were entitled to a procedure which was denied them solely because of the unconscionable behavior of the agencies. Logan describes a remarkably similar scenario, differing primarily in that it concerned negligence affecting one individual rather than the purposeful and unlawful deprivation of thousands.

This is not an instance in which Congress chose between various options producing equally unpalatable results (Resp. 6), but one where Congress selected the only option which was intended to negate long-existing eligibility. The recognized propriety of cut-off dates to define eligibility has no relevance to a situation where the cut-off date institutionalizes an agency's express refusal to comply with its statutory and constitutional obligations.

Secondly, respondent's statement that §3(h)(6) "plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981" is inaccurate. Claimants do not apply for dual benefits. They apply for all benefits to which they are entitled, and it is the Board's obligation to make the appropriate determinations of eligibility. 45 U.S.C. §231f(b)(1), (3). Most of those affected by §3(h)(6) were already receiving benefits when the Board reduced them because of their receipt of Social Security spousal benefits, see 45 U.S.C. §231b(m), and improperly refused to

reinstate those benefits pursuant to §3(h)(3) or (4). Thus, there was no additional application to be filed.

There may be some men who, though retired, never filed an application, and there were others who had not retired by August 13, 1981 and consequently had not filed an application by that date, but these were relatively few and were not the target of §3(h)(6). The target were the thousands of men who had retired, who had filed applications for benefits, and who had satisfied the vesting requirements of §3(h)(3) or (4) by the relevant date, January 1, 1975.

Consequently, to state that "the decision [below] is of minimal continuing importance" (Resp. 4-5) belittles not only the extraordinary action of the Board and the Congress, but ignores the significance of additional monthly benefits to thousands of men living on fixed incomes. See United States Railroad Retirement Board v. Fritz, 101 S.Ct. 453, 470 (1980) (Brennan, J., dissenting).

2. Two points not raised by respondent, but relevant to the consideration of the petition, also require brief discussion.

First, the Seventh Circuit has recently held that the district courts have no jurisdiction over claims brought under the Railroad Retirement Act. Denberg v. United States Railroad Retirement Board, No. 81-2386 (7th Cir., Jan. 4, 1983). Consequently, the court below in this case was wrong in suggesting that the Gebbie analysis could have been applied to a class through a district court action. See Pet.App. 16-A to 17-A n.7.

Secondly, a challenge identical to that in Frock is now pending in the Court of Appeals for the District of Columbia Circuit. Givens v. United States Railroad Retirement Board, Nos. 82-2183, -2184, -2185, -2312, -2313. Pursuant to 45 U.S.C. §231g, three individuals filed petitions for review on October 1, 1982, and two more filed on November 2, 1982. The five petitions for review were consolidated. Three of the petitioners (Nos. 82-2183 through -2185) have moved to represent a class of all those similarly situated. Petitioners'

opening brief was filed on December 20, 1982, and respondent's brief was filed on January 27, 1983. The clerk's office of the Court of Appeals has informed counsel for petitioners that oral argument will probably be heard in April or early May, 1983.

Respectfully submitted,

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